MAY 14 1970 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 173

IDA PHILLIPS,

Petitioner,

vs.

MARTIN MARIETTA CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION OF AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, FOR LEAVE TO FILE INSTANTER AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER.

AMICUS CURIAE BRIEF OF AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, IN SUPPORT OF PETITIONER.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO [redacted] 56

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Now comes Air Line Stewards and Stewardesses Association, Local 550, Transport Workers Union of America, AFL-CIO (hereinafter sometimes referred to as "ALSSA"), and moves the Court, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, for leave to file instanter an amicus curiae brief in support of Petitioner in this cause. In support of this motion, the following is shown:

(1) ALSSA is a voluntary unincorporated association and a labor organization and is the exclusive collective bargaining representative for in excess of 13,000 cabin attendants employed by 7 air carriers under the Railway Labor Act. Over 12,000 of these cabin attendants who are members of ALSSA are females.

(2) ALSSA in mid April of 1970 learned that the instant cause was pending before this Court, and, upon being further informed of the subject matter before the Court, ALSSA instructed its attorneys to seek leave to file an amicus curiae brief with the Court.

(3) ALSSA's attorneys did then immediately request consents from the attorneys for the parties in this cause for ALSSA to file an amicus curiae brief. On April 30, 1970, such consent was received by ALSSA from the attorneys for the Petitioner. On or about the same date, ALSSA received from the attorneys for the Respondent a communication in which such requested consent was refused.

(4) ALSSA has a special and almost unique interest in the issues before the Court in the instant case because of the nature of its membership and the problems that have accordingly arisen in collective bargaining with employers. In particular, ALSSA has been confronted with what has since been denoted by the Court of Appeals as "sex-plus" discriminations. This was, and in part still is, manifested in principally three categories, to-wit: (1) compulsory termination of female employees upon attainment of age 32 or age 35 (hereinafter sometimes referred to as "Age"); (2) compulsory termination of female employees because of marriage (hereinafter sometimes referred as a "Marriage"); and (3) compulsory termination of female employees because of pregnancy (hereinafter sometimes referred to as "Pregnancy"). In addition to the afore-

described situations involving termination, ALSSA is currently also being confronted with problems involving discriminations by employers based upon sex in hiring and promotions and in wages and other working conditions.

(5) Upon the enactment of Title VII of the Civil Rights Act of 1964, ALSSA, through a variety of measures and actions initiated and pursued by it, including litigation, negotiations, arbitration and use of the Equal Employment Opportunity Commission, has been successful in causing the elimination and reduction in the aforedescribed discriminations in employment as is indicated in the schedule below:

Carrier	Age	Marriage	Pregnancy
American Air Lines, Inc.	Discrimination eliminated.	Discrimination eliminated.	Discrimination still exists.
Transworld Air Lines, Inc.	Discrimination eliminated.	Discrimination eliminated.	Discrimination still exists.
Eastern Airlines, Inc.	No Employer Discrimination	Discrimination eliminated.	Discrimination eliminated.
Northwest Airlines, Inc.	Discrimination eliminated.	Discrimination eliminated.	Partial-discrimination still exists.
Carribean Atlantic Airlines	No Employer discrimination.	Discrimination eliminated.	Discrimination still exists.
Northeast Airlines, Inc.	No Employer discrimination.	Discrimination eliminated.	Discrimination still exists.
Southern Airlines, Inc.	Discrimination eliminated.	Discrimination eliminated.	Discrimination still exists.

(6) ALSSA believes that its ability to cause the elimination and reduction of the discriminations as aforesaid were in large part attributable to the enactment of Title VII and the moral and legal impact thereof upon employer carriers with whom ALSSA bargains. ALSSA further believes and suggests to the Court that, should the construction of Title VII and the rationale therefore stated by the Courts below be upheld, the effect would clearly be to cur-

tail or destroy the ability of ALSSA to further eliminate and reduce discrimination in employment based upon sex in the airline industry and might well even reeffectuate discriminations already eliminated.

(7) ALSSA further believes that its peculiar and extensive working experience with "sex-plus" discriminations in employment permits it to argue with special competence on that issue and on the full implications of the doctrine pronounced by the Fifth Circuit Court of Appeals.

Respectfully submitted,

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THE INTEREST OF THE AMICUS CURIAE.

The question presented in this cause is whether the sex discrimination prohibition of Sec. 703 of the Civil Rights Act of 1964 is applicable to a refusal by an employer to hire women with preschool children when the employer hires men with preschool children. The Court of Appeals for the Fifth Circuit held that such conduct was not vio-

lative of the Act basically because it did not involve discrimination purely on account of sex but rather discrimination on account of sex plus another factor. The Amicus Curiae has a special interest in this legal determination because, in its capacity as the bargaining representative for over 13,000 cabin attendants employed by air carriers, in excess of 12,000 of them being females, it has continually been confronted with "sex-plus" type discriminations. Should the standard adopted by the Fifth Circuit be upheld, the Amicus Curiae will no longer have the benefit and support of federal law in its long standing efforts to eliminate discrimination based on sex in the employment of cabin attendants by air carriers.

ARGUMENT.

If the "Sex-Plus" Standard or Social Custom Standard Adopted by the Court of Appeals Is Sustained, Then the Act Is Rendered Largely Nugatory.

Two rationales are proposed by the Courts below in support of their respective constructions of the Act. The first is that employers are entitled to take into consideration the role normally imposed upon women in society,[1] and the

1. The District Court stated it thus: "The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies." (See App. to Petit. for Cert., P. 2a.) The Court of Appeals similarly concluded when, referring to the assertion of the E.E.O.C. that Congress intended "to exclude absolutely any consideration of the differences between the normal relationship of working fathers and working mothers to their pre-school age children, and to require that an employer treat the two exactly alike in the administration of its general hiring policies . . . ", the Court responded: "The common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose in the formulation of this statute." (See App. to Petit. for Cert., P. 10a.)

second is that the Act is not broad enough in its prohibitions to encompass "sex-plus" discriminations.[2]

In discussing the first rationale, it is essential to note that the Courts below were not speaking within the framework of business-related concerns of an employer. These could be asserted as a defense under the "bona fide occupational qualifications" exception which is available to an employer under Sec. 703(e) of the Act, but which was not raised in this cause. To the contrary, therefore, the Courts below were adopting the proposition that, notwithstanding the prohibitions of this Act, the employer is entitled to give credence and effect to the social proposition that the proper place and role of a mother with pre-school age children is in the home and not at work. Moreover, if one is to accept this proposition, it is likewise left to the employer's discretion as to whether a mother who is the head of a household consisting of pre-school children is to work to support her family or is to go on the relief rolls.

Needless to say, neither Court below was able to demonstrate from either the language of the Act nor its Congressional history any support for this delegation of social decision-making to employers. It would be incongruous indeed for the Congress to legislate equal employment opportunities between the sexes and then to repose in employers a residual right to discriminate in the event that equality was abhorrent to the employer's sense of social propriety. We know of no anti-discrimination legislation which embodies that concept; the concept is patently the very antithesis of anti-discrimination.

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2. The Court of Appeals reasoned: "The discrimination was based on a two-pronged qualification, *i.e.*, a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired. In view of the above, we are convinced that the judgment of the District Court was proper, and we therefore affirm." (See App. to Petit. for Cert., Pp. 9a-10a.)

The plain fact is that social customs and expectations are often equivalent to social prejudices. This is easily demonstrated by the history of judicial implementation of the prohibition of discrimination on account of race, religion or color. It is equally applicable with respect to discrimination on account of sex. Hence, an exception based on social custom to the prohibition of discrimination on account of sex is tantamount to a surrender to social prejudices. It is unthinkable that Congress left the individual employer with discretion to enforce its interpretation of social prejudices in the field of employment.

The Amicus Curiae is particularly sensitive to the judicial consideration of the doctrine discussed above. Its concern flows from its role in representing cabin attendants on air carriers, to-wit: stewardesses, hostesses, stewards and pursers. For perhaps in no other field are social prejudices unrelated to work performance or other legitimate business considerations so pervasively based upon the sex of the employee. Should these prejudices be sanctioned by judicial decree, there can be no federally protected equality of work opportunity between the sexes among cabin attendants on airplanes.

The Second rationale adopted by the Court of Appeals is "sex-plus." It is respectfully submitted that the Court has engaged in a non sequitur in its reliance upon the additional criterion other than sex to justify its legal conclusion. The proscription in the Act makes its "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . ." The employer in the instant cause has applied a criterion to females to bar employment when it does not apply the same criterion to men. In no way can the words of the

Act be tortured or strained to permit that result. No matter how one reads the above language, Mrs. Phillips is being discriminated against because of her sex.

In actuality, "sex-plus" is no more than a declaration by the Court below that, although the Act prohibits blanket discrimination against *all* members of one sex in favor of the other sex, it does not prohibit discrimination against *some* members of the unfavored sex as compared to members of the favored sex in comparable positions.[3]

If the test is to be whether a "sex-plus" condition discriminates against some rather than all members of a sex, then, as was stated by Chief Judge Brown, dissenting below: "If 'sex-plus' stands, the Act is dead." (See App. to Petit. for Cert., p. 18a.) For, as Chief Judge Brown proceeded to point out, an employer intent upon discriminating need exert but limited imagination to devise a variety of non-business-justified standards which would effectively eliminate the vast bulk of females from prospective employment and thereby permit the employer to effectively circumvent the purposes of the Act.

Judge Brown's caveat is clearly dramatized by the history of "sex-plus" discriminations against female cabin attendants as contrasted to their male counterparts. They have been involuntarily retired by various air carriers upon (1) attainment of age 32 or 35; (2) marriage; and

3. The Respondent appears to have suggested this distinction to the Court of Appeals by a concession it made at p. 9 of its Brief: "It is of course possible that an otherwise valid employment standard could be used to discriminate in a manner prohibited by Title VII. For example, a company policy of refusing to hire anyone who lived more than three miles from the plant would not on its face violate Title VII, since the Act does not bar geographical discrimination as such. But if it were shown that only white workers lived within the three mile limit and that all the black population of the community was centered outside of that area, then quite possibly this otherwise innocuous discrimination would in fact be an invidious discrimination against race, which is prohibited by the Act."

(3) pregnancy; no corresponding terminations of employment have been exacted against the male employees.

The effective erosion of female employment opportunities, should such "sex-plus" criteria for discrimination be legitimatized, can be easily seen. By compelling retirement at an early age, an employer is forcing a female employee to leave the career for which she is trained, to forfeit seniority benefits and to seek training or employment in a new field, probably at reduced pay. In comparison, a male employee can continue his career until normal retirement.

Should the opportunity for marriage appear, the female employee is given a choice—no husband or no job. The male employee can marry as often as he wishes without prejudicing his job.

Should the female employee become pregnant, she loses her job. It is immaterial whether the conceived child is born alive; it is immaterial whether the female will be required to support her child; it is immaterial whether the female gives up the child for adoption. The male employee can father as many children as he will without prejudicing his job.

Since the purpose of the subject prohibition in the Act was to eliminate the double standard in employment based upon sex and to equalize employment opportunities for women, it is submitted that the very essence of the law will be subverted if the foregoing discriminations against female cabin attendants are to be sanctioned under the guise of a "sex-plus" test.

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed and remanded with appropriate instructions.

Respectfully submitted,

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